IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-844

E. E. FALK, ET AL.,

Petitioners,

—v.—

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE REALTY ADVISORY BOARD ON LABOR RELATIONS, INC., *AMICUS CURIAE*

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Statement of Interest

The Realty Advisory Board on Labor Relations, Inc.* is a membership corporation whose members are owners and managing agents of apartment and commercial buildings in New York City. Its members employ in excess of 20,000 building service employees, and, as representative of its members, the corporation negotiates collective bargaining agreements on their behalf with building service local unions.

* This brief *amicus curiae* is filed pursuant to the consent of all parties to the case. The consents are filed with the Court together with this brief.

Proceedings Below

The Secretary of Labor (hereafter "Respondent") commenced this action under Fair Labor Standards Act §17 to enjoin Drucker & Falk (hereafter "Petitioner"), by its five co-partners, from violating the Act's minimum wage, overtime, and record-keeping provisions and require payment of allegedly owed wages in respect to certain maintenance workers.* Petitioner denied that it had violated the Act, claiming that the maintenance workers were not in its employ and also that its business did not meet the requirements of an "enterprise" within the Act's ambit. The District Court for the Eastern District of Virginia sustained both contentions and dismissed Respondent's complaint. 312 F. Supp. 608, 613 (1970). The Fourth Circuit Court of Appeals reversed on both issues and granted Respondent the requested relief. 439 F.2d 340 (1971).

Writ of certiorari was denied by this Court on October 12, 1971. 404 U.S. 827. After additional district court and appeals court proceedings regarding the appropriateness of prejudgment interest, Petitioner again requested a writ of certiorari. On February 28, 1973, the Court decided *Brennan* v. *Arnheim and Neely, Inc.*, holding that a real estate management company's activities at the different properties it services constitute an "enterprise" within the meaning of the Act. 93 S. Ct. 1138. The Court, in its opinion, stated that the "important" issues of whether a managing agent is an "employer" of the building workers within the meaning of the Act and whether the proper measure

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* The Fair Labor Standards Act of 1938 as amended, 29 U.S.C. §§201 *et seq.*, is referred to as the "Fair Labor Standards Act," the "FLSA," or the "Act."

of the agent's "gross sales" is its gross rentals collected or its gross commissions, were not before it, and announced that it had granted certiorari in *Falk* v. *Brennan* to consider these issues. 93 S. Ct. at 1141, 1143 & n. 8.

Summary of Argument

The principal issue in these proceedings is whether the business of the apartment project owner or that of his managing agent is measured for qualification under the FLSA's minimum dollar and interstate commerce requirements in order to determine whether certain maintenance workers are "employed in an enterprise engaged in commerce or in the production of goods for commerce" and so covered by the Act.

Under the FLSA enterprise concept, the Act applies to the employees of any business within the Act's scope. The FLSA designates every business concern as either covered or exempt. Petitioner's business is arguably covered. The project owners' businesses are both so small and so local as to be exempt.

It is clear from the Act's "history, terms, and purposes" that it is the business of the apartment project owner and his alone, that is measured to determine whether the Act applies to the maintenance workers at his project.

For an "enterprise" to qualify as being "engaged in commerce or in the production of goods for commerce" and so be covered by the Act, it must be large enough to do currently at least two hundred and fifty thousand dollars of business each year. The purpose of this minimum dollar requirement, as the legislative history makes clear, is to

exclude small businesses in order to protect them from the resultant dislocative effects of the Act's application. This objective can be accomplished only if the measuring entity is that business which ultimately bears the labor costs. Here, the workers are paid out of the owner's funds and the owner alone enjoys the profits and suffers the losses from the project's operation. If the measuring entity used is the business of the managing agent who receives a set fee and has no equity in the apartment project, application of the minimum dollar requirement would be a sham. It is the project owner, who stands to suffer the dislocation which the Act's minimum dollar requirement seeks to avoid, whose business must be measured for compliance with that requirement.

The importance of interpreting the minimum monetary requirements so as to carry out the Act's purpose to protect small businesses is demonstrated by the facts of the instant case. A decision that the Act applies to these workers would significantly increase the operating costs and likely drive from business many small entrepreneurs in an industry in which supply already lags alarmingly behind the demand. New York City, for example, is plagued by a major shortage of adequate low and middle income housing. Yet, owners of many such units presently in existence are operating businesses so marginal that any increased labor cost resulting from the FLSA's application could force them out of business. It was Congress' precise intent in exempting such small businesses to protect them, and this Court must not endorse Respondent's attempt to circumvent fulfillment of that purpose.

The Fourth Circuit's mistaken adoption of Respondent's theory resulted from its misunderstanding of the

issue before it. That court failed to distinguish the question of whether an employment relationship exists for coverage purposes from that of whether a business is an "employer" so as to be subject to derivative liability within the meaning of Section 3(d). Thus, it misconstrued FLSA Section 3(d)'s definition of "employer" and decisions holding a managing agent derivatively liable as support for measuring the managing agent's business for coverage purposes. It erroneously assumed that because several different businesses may be "employers" for liability purposes, any of several different businesses may provide the foundation for enterprise coverage of a given employee, no matter how flimsy and tenuous the employment relationship. That assumption is not only unprecedented and destitute of support, it is contrary to the FLSA's distinct implication that only a worker's one actual employment relationship can afford the basis for enterprise coverage.

Furthermore, the Fourth Circuit's decision has the effect of drawing the apartment project owners' exempt businesses under the Act solely as a result of having engaged the services of a large business concern. This result is both unjust and in direct contravention of a Congressional prohibition.

Facts

Drucker & Falk is a property management firm which manages approximately thirty apartment projects, comprised of one and two story apartment buildings, located in various cities in Virginia.* (A. 85).** Each of the proj-

* Drucker & Falk also sells real estate and insurance.

** References to the Appendix to the pleadings in the Fourth Circuit Court of Appeals are identified by "A." followed by the

ects is separately owned, and each of the owners has independently contracted with Petitioner for the latter's services (the "contract"). (A. 16-19, 38-39). These contracts provide generally that Petitioner as the owner's "agent" is to operate and maintain the project on a day-to-day basis, subject to the overall direction and approval of the owner. (A. 85-87, 89-91). The owner in turn agrees to pay Petitioner a set percentage of the gross monthly rental. (A. 87, 101, 109).

Maintenance workers (hereafter the "maintenance workers" or "workers") have been hired at each project to perform the maintenance, repair, alterations and upkeep that the project requires. These workers, whom the contract designates "employees" of their respective project owner, are paid by that owner, through Petitioner as its agent, out of the owner's funds. Each owner carries his workers on his books as employees of his project and carries a separate employer identification number. (A. 85-90). Workers remain at their project even after the owner has terminated Petitioner's services.* † (A. 92).

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appropriate page number(s). References to the Brief filed by Respondent in the Court of Appeals are identified as "Res. Br." All statutory citations herein, unless otherwise identified, are to the Fair Labor Standards Act.

* As a result, some of the workers at issue in this action are presently working at projects that no longer receive Petitioner's services. (A. 93).

† A very small percentage of the workers have been employed at two different owners' projects. Some workers were engaged at two projects at once for efficiency purposes, while a few others changed projects pursuant to promotions. (A. 92-93). These arrangements are not inconsistent with viewing these individuals as the owners' employees in that they would likely evolve as the need dictated even in the absence of a managing agent. Two apartment project owners who could more efficiently share maintenance

The workers at each project include a "project manager" or "maintenance superintendent" who lives on the premises. The maintenance superintendent hires, fires, and supervises the other workers at his project and has the final word in setting their wages. (A. 89). He meets and discusses project needs with the owner during the latter's visits to the apartment project, which may be as often as once a month. (A. 90-91).

Petitioner fulfills its responsibility for the project's maintenance and upkeep through its supervision of the maintenance superintendent. While directly responsible to Petitioner's officials and required to follow Petitioner's policies, each maintenance superintendent is "fairly autonomous because of their demonstrated good judgment and performance." The project owner, on the other hand, provides overall direction to this effort through budgeting, regular visits to the apartment project, and subsequent conferences with the maintenance superintendent and Petitioner's officials. The project owner's semi-annual budget sets specific allowances for maintenance costs such as pay-

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personnel would be expected to do so. A worker who was offered a substantial promotion and salary hike at a project other than his own would likely accept. It is noteworthy that in each of these instances, the owners participated in making the two-project decision. (A. 92-93).

A thorough examination of the facts in these particular cases could reveal that the individuals involved merit special classification. Those who worked for two owners at once may be entitled to have all working hours computed together for overtime purposes under the "joint employer" doctrine. *See* 29 C.F.R. § 791. The circumstances in a few instances could even dictate classifying the workers involved as employees of Petitioner for coverage purposes.

In any event, the significance of this relative handful of exceptions is *de minimis*. The overwhelming majority of the workers at issue in this action have been associated with a single project and project owner throughout the period in question.

roll, painting, grounds maintenance, plumbing, equipment, repair, appliance replacement, etc.* (A. 89-91).

Each project's rent payments and other receipts are collected by Petitioner and deposited in a trust account. Petitioner, as agent for the owner, pays the project's expenses including the payroll and its own fee out of that account, providing the owner with a detailed list of disbursements. (A. 86; Res. Br. 7). The balance, if any, is returned to the owner and any deficit in the account must be made up by the owner. In sum, any profit or loss from a project's operation is solely the owner's. Petitioner has no equity in the project and receives the identical fee regardless of profit or loss.** (A. 86-87, 101, 109).

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* In addition to its responsibility for maintenance and upkeep, Petitioner also provides management and rental services. Thus, it collects rents, seeks to let vacant apartments and tends to other administrative details. These tasks are carried out directly by Petitioner's personnel in some instances and by the individual project owner's personnel, under Petitioner's supervision, in others. The personnel who provide these services are not at issue in this action.

** The typical contract between managing agents and apartment building owners in the City of New York differs from these contracts in the following significant respects:

(1) Very rarely does a building service employee work on the premises of two different buildings.

(2) Each building's rent payments and other receipts are usually kept in a separate bank account and never intermingled with the revenues of any other building managed by that agent.

(3) Very rarely do a managing agent's personnel provide "management and rental services," such as collecting rent and letting vacant apartments, on the premises.

(4) Most building service workers are organized, and, in each building, contract through their representative union

I.

THE ACT DOES NOT APPLY TO THE MAINTENANCE WORKERS BECAUSE THEY ARE THE EMPLOYEES OF THE APARTMENT PROJECT OWNERS WHOSE BUSINESSES ARE EXEMPT FROM THE FLSA's APPLICATION.

A. *The Individual Apartment Project Owners' Businesses Being So Small and Local That They Are FLSA-Exempt, the Act Does Not Apply to the Workers if They Are in the Owners' Employ.*

The Fair Labor Standards Act of 1938, as originally enacted, applied only to individual employees who were themselves "engaged in commerce or in the production of goods for commerce." P.L. 75-718, §§6(a), 7(a), 52 Stat. 1062, 1063. In 1961, the Act was amended to cover "certain large enterprises engaged in commerce or in the production

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(either Local 32B or Local 32E, Service Employees International Union, AFL-CIO) with the owner of their respective building regarding their terms and conditions of employment. (Even a landlord who owns two or more buildings must have a separate agreement for the workers at each.)

Under these agreements, such terms as length of vacation, amount of termination pay, order of layoff, and order of entry into more desirable jobs depend on the worker's seniority at that particular building. A worker who changes buildings loses all his seniority. Finally, these agreements are not terminated by a change of managing agent; only a change in ownership necessitates negotiating a new agreement. (*See, e.g.*, Collective Bargaining Agreement Between Realty Advisory Board on Labor Relations, Inc., and Local 32B Service Employees International Union, AFL-CIO, effective April 21, 1973 through April 20, 1976.)

If the Court does conclude that the workers at issue here are Petitioner's employees for coverage purposes, it should limit its holding to the facts before it in order to avoid unwarranted effects on other, more typical relationships between apartment building owners and managing agents.

of goods for commerce." S. Rep. No. 145, 87th Cong., 1st Sess., 24-25 (1961). Under the Act's "enterprise" approach, if a business was sufficiently large and involved in interstate commerce to satisfy the coverage criteria in Section 3(s), all that business' employees were subject to the Act.*

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* FLSA Sections 6 and 7, the minimum wage and maximum hour provisions, now provide in pertinent part:

> "Sec. 6. (a) Every employer shall pay to *each of his employees who* in any workweek is engaged in commerce or in the production of goods for commerce, or *is employed in an enterprise engaged in commerce or in the production of goods for commerce,* wages at the following rates:
>
> . . .
>
> "Sec. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ *any of his employees who* in any workweek is engaged in commerce or in the production of goods for commerce, or *is employed in an enterprise engaged in commerce or in the production of goods for commerce,* for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (Emphasis added.)

An "enterprise engaged in commerce or in the production of goods for commerce" is defined in pertinent part as follows:

> "'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
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> (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) . . . , and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated); . . . ." (Section 3(s))

Respondent contends that the workers at issue fall within the FLSA's ambit because they are employed by such a business. (A. 7-8; Res. Br. 7-8).

Section 3(s) provides generally that a concern such as an apartment project or a property management firm is covered only if it satisfies two requirements:

> (1) the business has two or more employees engaged in commerce or in the production of goods for commerce; and
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> (2) the business did an annual business of at least $500,000 during the period 1967-69 and at least $250,000 from 1969 on.

Petitioner's business is arguably covered by the FLSA. The businesses of the individual apartment project owners clearly are not covered. (Respondent admits that the individual apartment project owners' businesses are too small and too local to qualify for FLSA coverage.)* (A. 87). The central question presented by this case is which of these two businesses—the apartment project or the managing agent—should be measured for qualification under the FLSA's requirements in determining whether these workers come under the enterprise coverage blanket.

B. *The History, Terms and Purposes of the FLSA Make It Clear That the Workers Are Employed by the Owners and Not Petitioner.*

The FLSA's definitions are not helpful in determining which of two independent businesses a worker is "employed" by and so which should be measured for qualifica-

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* Although one of the individual owner's projects apparently has qualified for coverage since 1967 and several others have qualified since 1969, the workers at these projects have been paid in accordance with the FLSA and so are not at issue in this action. (A. 93-94).

tion as an "enterprise engaged in commerce or in the production of goods for commerce." "Employ" is defined to "include to suffer or permit to work" (§3(g)); "employee" is defined in pertinent part to "include any individual employed by an employer" (§3(e)); and "employer" in pertinent part to "include any person acting directly or indirectly in the interest of an employer in relation to an employee" (§3(d)). The courts have repeatedly held that these broad, vague statutory definitions do not serve as a meaningful guide to determine the existence or non-existence of an employment relationship. *E.g., Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 728-31 (1947); *Walling* v. *Portland Terminal Co.,* 155 F.2d 215, 217-20 (1st Cir. 1946), *aff'd,* 330 U.S. 148 (1947); *Walling* v. *Sanders,* 136 F.2d 78, 81 (6th Cir. 1943); *Helena Glendale Ferry Co.* v. *Walling,* 132 F.2d 616, 620 (8th Cir. 1942); *Bowman* v. *Pace Co.,* 119 F.2d 858, 860-61 (5th Cir. 1941). As this Court has stated in regard to these definitions, ". . . there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 728 (1947).

The Fourth Circuit, in its decision below, confused the issue of whether Petitioner is an "employer" so as to be subject to derivative liability* within the meaning of Section 3(d)** with that of whether Petitioner is the

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* A defendant is "derivatively liable" when its liability arises not from its relationship to the plaintiff but rather from its relationship to an already-liable defendant. *See, e.g., Shultz* v. *Chalk-Fitzgerald Construction Co.,* 309 F.Supp. 1255, 1257 (D. Mass. 1970).

** Section 3(d) provides as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an em-

workers' employer for coverage purposes. 439 F.2d at 345. While it may seem unusual to contend that an "employer" is not "employing" the workers in question, two different statutory provisions are being discussed, each with a different objective. Section 3(s), defining an "enterprise engaged in commerce or in the production of goods for commerce," sets forth the minimum standards necessary for a business to be subject to the minimum wage and maximum hour provisions of Sections 6 and 7. Section 3(d), defining the term "employer," provides that for businesses that are in fact subject to Sections 6 and 7, the responsibility to comply with the Act can fall upon several different persons as "employers."

As has often been recognized, it is one thing to determine whether a party comes within the Act's broad definition of "employer"; it is quite another to determine whose business to look to for determining whether the workers at issue are employed by an enterprise that satisfies the requirements of dollar amount of business done and nexus with interstate commerce for the FLSA to apply. *See Hodgson* v. *Royal Crown Bottling Company*, 324 F. Supp. 342, 346, 347 (N.D. Miss. 1970), *aff'd*, 465 F.2d 473 (5th Cir. 1972); *Shultz* v. *Isaac T. Cook Company*, 314 F. Supp. 461, 466-67 (E.D. Mo. 1970); *Wirtz* v. *Country Club Acres, Inc.*, 18 WH Cases 627 (N.D.N.Y. 1968), *aff'd*, 19 WH Cases 559

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ployee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

(2d Cir. 1969); *Mungovan* v. *Manierre*, 7 L.C. ¶61,646 (N.D. Ill. 1943). *See also Hodgson* v. *Servomation-Ajax Co.*, 323 F. Supp. 1047 (N.D. Miss. 1971). Section 3(d) was evidently formulated so broadly in order to facilitate the Act's enforcement. *See Brennan* v. *Community Service Society of New York*, 7 L.C. ¶61,745 at 65,130 (N.Y. City Ct. 1942).

When Congress has failed to "explicitly define" a term such as "employ," the question whether the workers at issue are employed by a particular business

> ". . . must be answered primarily from the history, terms and purposes of the legislation. The word ['employee'] 'is not treated by Congress as a word of art having a definite meaning. . . .' Rather 'it takes color from its surroundings . . . [in] the statute where it appears,' *United States* v. *American Trucking Assns.*, 310 U.S. 534, 545, and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.' *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259; *cf. New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552; *Drivers' Union* v. *Lake Valley Co.*, 311 U.S. 91." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 120, 124 (1944).

The significance of which business each worker is employed by, is that Respondent rests its claim that the FLSA applies to these workers on its argument that they are all "employed in an enterprise engaged in commerce or in the production of goods for commerce." To qualify as such in any year, a business has to meet the minimum dollar requirement for that year.* Petitioner's business ar-

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* The minimum dollar requirement for qualification as a "business engaged in commerce or in the production of goods for commerce" in any given year is:

guably meets the minimum dollar qualification for every year since and including 1965; the owners' businesses do not qualify for any year.* Thus, the Act's application to these workers turns on whether the dollar size of Petitioner's or each owner's business is considered. A review of the "history, terms and purposes" of the FLSA makes it abundantly clear that when Congress made it a prerequisite for the coverage of these workers that the business in which they are "employed" be an "enterprise engaged in commerce or in the production of goods for commerce," it was talking about the business of each owner and not Petitioner's business.

The FLSA's dollar requirement appears on its face to be intended to protect small businesses. This interpretation receives overwhelming support from the Senate Report that accompanied the 1961 amendment that first added "enterprise" coverage and the dollar requirement to the Act. Fair Labor Standards Amendments of 1961, P.L. 87-30, 75 Stat. 65.** In an initial summary section, the

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1962–66	$1,000,000 in "annual gross volume of sales" (Fair Labor Standards Amendments of 1961, P.L. 87-30, §2(c), 75 Stat. 65)
February 1, 1967–January 31, 1969	$500,000 in "annual gross volume of sales made or business done" (FLSA §3(s))
February 1, 1969	$250,000 in "annual gross volume of sales made or business done" (FLSA §3(s))

* See footnote at p. 11, *supra*.

** The requirement that a business do at least a million dollars in sales to be an "enterprise engaged in commerce or in the production of goods for commerce" was contained in a bill proposed by the Kennedy Administration. Then Secretary of Labor Arthur Goldberg spoke in support of the bill before a subcommittee of the House Education and Labor Committee. Hearings on H.R. 3935 Before the Special Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 1st Sess., 4 (1961). His remarks regarding the purpose of the proposed minimum dollar

Report clearly sets forth the purpose of the Act's requirement that a business have an "annual gross volume of sales" of at least $1,000,000 (presently $250,000) in order to qualify as an "enterprise engaged in commerce or in the production of goods for commerce":

> "Finally, the million dollar test in the committee bill is not the constitutional standard for coverage. The constitutional standard for coverage is contained in these requirements which have just been discussed. The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law." S. Rep. No. 145, 87th Cong., 1st Sess., 5 (1961).*

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requirement for retail and service stores included the following statement:

> "We are covering, or proposing that we cover, large stores, large chainstores. We are proposing to cover—and we use the term 'an enterprise' for that purpose—an enterprise which has through its one or more constituent units, related units—in other words, if they are in the grocery business, grocery stores, markets—which have annual sales of more than a million dollars a year, and that has to be a pretty substantial store or enterprise. We are not talking about the small family store and I do not know why these small stores get involved in this and are concerned about this.
>
> And you may be interested in knowing how many establishments we are seeking to cover, how many enterprises we are seeking to cover. There are hundreds of thousands of small stores throughout the United States. We are only proposing to cover in our retail and service coverage 15,000 enterprises. That is all. That shows you the magnitude of these enterprises, with 100,000 establishments. In other words, for a country as large as ours, we are dealing with a relatively small number of enterprises, 15,000 enterprises. And in the 15,000 enterprises there are 100,000 establishments doing this volume of business."

Id. at 23.

* The remainder of the Report contains numerous additional statements indicating that the dollar limit was intended to protect

This Court recently reached the same conclusion, finding that "it is true that one purpose of the dollar volume limitation in the statutory definition of 'enterprise' is the exemption of small businesses." *Brennan* v. *Arnheim and Neely, Inc.*, 93 S. Ct. 1138, 1143 (1973).

Once it has been established that the purpose of the minimum dollar requirement is to avoid economic dislocation of small businesses, it becomes readily apparent what the FLSA means by *"employed* in an enterprise engaged in commerce or in the production of goods for commerce." (Emphasis added.) An effect of extending the FLSA's application to a group of employees is to increase the cost of the work they perform. In order for the Act's dollar requirement and the exemption it affords small business to be effective, a worker must be *"employed"* by that business which will suffer those increased costs.

If the FLSA were extended to cover the workers at issue here, the increased cost would be borne solely by the owners. According to Petitioner's contract with each apartment project owner, Petitioner collects the rent, pays the building's expenses, including its own fee and

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small businesses. *Id.* at 25 (l. 12-15); 27 (l. 8-21); 31 (l. 15-23); 41 (l. 35-38). *See id.* at 77 (l. 29-44); 99 (l. 10-48) (minority views of Senators Barry Goldwater and Everett M. Dirksen). Significantly, a review of the Senate, House and Conference Reports that accompanied both the 1961 and the 1966 amendments reveals nothing indicating that the protection of small businesses was not the purpose of the minimum dollar requirement. *See* Conf. Rep. No. 327, 87th Cong., 1st Sess. (1961); S. Rep. No. 145, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 75, 87th Cong., 1st Sess. (1961); Conf. Rep. No. 2004, 89th Cong., 2d Sess. (1966); S. Rep. No. 1487, 89th Cong., 2d Sess. (1966); H.R. Rep. No. 1336, 89th Cong., 2d Sess. (1966).

the payroll out of it, and gives the balance of the funds, if any, to the owner. (A. 86; Res. Br. 7). Any profit or loss from the project's operation is solely the owner's. Petitioner's income will remain the same whether the Act is held applicable to these workers or not.* (A. 86-87, 101, 109).

Therefore, the term "employed in an enterprise engaged in commerce or in the production of goods for commerce" must mean the apartment project owner. Any other interpretation would make a sham of the Fair Labor Standards Act's clear purpose to protect this nation's small businesses. The effect on the apartment project owners of the Fourth Circuit's holding that their maintenance workers are the managing agent's employees and are thereby subject to the Act, is virtually identical to that if these owners were to lose their exemptions.

C. *The Existing Case-Law Supports the Conclusion That the Workers Are Employed by the Owners and Not Petitioner.*

In *Hodgson* v. *Arnheim and Neely, Inc.*, 444 F.2d 609, 612 (1972), *rev'd on other grounds*, 93 S. Ct. 1138 (1973), the Third Circuit held that in the circumstances of that case, the maintenance workers were the employees of the managing agent.

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* The Fourth Circuit's statement that "rental agencies, such as defendants here . . . are [not] the sole beneficiaries of the underpayment of [the maintenance workers'] wages," implying that Petitioner does benefit from such "underpayments," is incorrect. 439 F.2d at 345. Petitioner's sole compensation for its services is a fixed percentage of the gross rentals. (A. 87, 101, 109). An increase in the pay to maintenance workers would, if anything, benefit Petitioner in providing a more competent and responsible workforce.

Apart from that decision (which it will be demonstrated below was in error (see p. 28, *infra*)), the existing precedent uniformly supports the conclusion that the workers are employed not by Petitioner but by the individual owners. The first reported decision was *Mungovan* v. *Manierre* in which a building service worker's action against the managing agent to recover overtime was dismissed, holding that the building owner and not the agent was the plaintiff's employer. 7 L.C. ¶61,646 (N.D. Ill. 1943).

Subsequently, the Federal District Court for the Southern District of New York found a building owner principally liable in an action by maintenance workers for unpaid overtime compensation. *Greenberg* v. *Arsenal Building Corporation*, 50 F. Supp. 700 (S.D.N.Y. 1943). The court also held the managing agent derivatively liable under Section 3(d) as a result of having acted as the owner's, the actual employer's, agent or representative. 50 F. Supp. at 703. The Second Circuit affirmed, concluding that if Section 3(d) were not construed to make the managing agent derivatively liable, "the section would have little meaning or effect." 144 F.2d 292, 294 (1944), *rev'd in part on other grounds sub nom. Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945).

The same result was reached in another suit by maintenance workers to recover unpaid overtime compensation. *Asselta* v. *149 Madison Avenue Corporation*, 65 F. Supp. 385 (S.D.N.Y. 1945), *aff'd*, 156 F.2d 139 (2d Cir. 1946), *aff'd*, 331 U.S. 199 (1947). The trial court found the building owner principally liable as the actual employer and then held the managing agent derivatively liable as the employer's agent:

> "An agent who acts in the interest of an employer in relation to an employee is liable as an 'employer' for sums owed by the owners. 29 U.S.C.A. §203(d); Greenberg v. Arsenal Building Corp., 144 F.2d 292." 65 F. Supp. at 389.

See also Fleming v. *Arsenal Building Corporation*, 125 F.2d 278 (2d Cir. 1941) (L. Hand), *rev'g* 38 F. Supp. 207 (S.D.N.Y. 1941), *aff'd sub nom. A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (1942) (Action by building service workers for overtime pay. "(We may ignore the defendant [managing agent] for any decision as to it must concededly follow that as to [the building owner], of which we shall speak as the defendant.)")*

More recently, the Sixth Circuit determined the Act's application to a group of maintenance workers by measuring the business of the building's owner, despite the presence of a managing agent who supervised the workers' day-to-day activities. *Wirtz* v. *Columbian Mutual Life Insurance Company*, 380 F.2d 903, 905 (1967), *aff'g* 246 F. Supp. 198 (W.D. Tenn. 1965). The court determined that the Act was applicable and proceeded to hold the owner directly liable.**

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* That the courts in *Greenberg*, *Asselta*, and *Fleming* did find the managing agent derivatively liable for the building owner's violations in no way supports Respondent's position. One court described the relationship between the employee and the derivatively-liable employer as follows:

> "As to such person [the derivatively liable 'employer'], liability is predicated not on the existence of an employer-employee relationship between him and the employee but on the acts he performs in the interest of the employer in relation to the employee." *Shultz* v. *Chalk-Fitzgerald Construction Co.*, 309 F.Supp. 1255, 1257 (D. Mass. 1970).

** The district court below properly relied on *Columbian Mutual* in concluding that the workers were not employees of the agent. 312 F.Supp. at 613. The Fourth Circuit, in reversing that finding,

Every one of these decisions held the owner the actual employer and the managing agent, at most, a derivative-statutory employer. As the finding of liability in each was based on the premise of the building owner's primary liability, adoption of Respondent's theory would cast doubt on the viability of these decisions and may require their reversal.*

D. *The Fourth Circuit's Decision That Petitioner and Each Owner Can Be Joint Employers for Coverage Purposes Is an Unprecedented and Ill-Advised Extension of the Joint-Employer Doctrine and Contravenes Clear Congressional Intent.*

In its opinion below, the Fourth Circuit concluded that Petitioner and each apartment project owner could be "joint employers for purposes of the Act." 439 F.2d at 345. As a result, the court found it unnecessary to decide which of the two businesses should be measured to determine whether the Act is applicable. The Sixth Circuit Court of Appeals' decision that the owner's business should be measured,** relied on by the district court, was distinguished on the ground that the joint-employer doctrine makes the Act applicable to such workers if either the owner's or the managing agent's business is covered by the Act. 439 F.2d at 345 n.10.

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purported to distinguish *Columbian Mutual* on the ground that the workers may be jointly employed. 439 F.2d at 345 n.10. In doing so, the Fourth Circuit misunderstood the holding in *Columbian Mutual* and misapplied the joint-employer doctrine. See pp. 21-23, *infra*.

* If the managing agent in each of these cases were the party allegedly primarily liable, it would be able to assert defenses unavailable to it as a derivatively-liable defendant.

** *Wirtz* v. *Columbian Mutual Life Insurance Company*, 380 F.2d 903 (1967), *aff'g* 246 F.Supp. 198 (W.D. Tenn. 1965).

Such an application of the joint-employer doctrine demonstrates a misunderstanding of both the doctrine and of the FLSA's enterprise-coverage concept. According to the Department of Labor's own regulations, the consequence of joint employment is to require treating an FLSA-covered employee's work for two or more different employers as arising out of a single employment relationship. 29 C.F.R. § 791. The regulations state, in pertinent part, as follows:

> "If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the act. *In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.*" 29 C.F.R. §791.2. (Emphasis added.) (Footnotes omitted.)

In other words, the joint-employment doctrine is pertinent only once FLSA coverage is found to be present. It is irrelevant to the threshold question whether a business is covered by the FLSA.

Never before has this doctrine been used as a short-cut to determine that a business enterprise is covered by the FLSA.* The vast majority of joint-employer cases that have arisen under the Act have involved combining a covered employee's hours worked for two different but associated employers so as to make the Act's overtime provisions applicable. *E.g., Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F.2d 655 (10th Cir. 1942); *Durkin* v. *Waldron,* 130 F.Supp. 501 (W.D. La. 1955).**

E. *The Fourth Circuit's Erroneous Decision That Petitioner's Business Is Measured to Determine the FLSA's Application to These Workers Resulted From That Court's Misunderstanding of the Issue Before It.*

The FLSA as administered contains several features that facilitate its enforcement. The broad definition of "employer" assists a covered employee in finding a party who can be held responsible for his actual employer's wrongdoing. The judicially-developed joint-employer doc-

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* Respondent, in its brief below in the court of appeals, cited a case in which the District of Columbia Circuit Court held that a management company was a joint employer with the building owner within the meaning of the National Labor Relations Act and so could be required to bargain with the union representing the maintenance employees. *Herbert Harvey, Inc.* v. *NLRB,* 385 F.2d 684 (D.C. Cir. 1967), 424 F.2d 770 (D.C. Cir. 1969). While "decisions that define the coverage of the employer-employee relationship under the [NLRA] are persuasive in the consideration of a similar coverage under the [FLSA]" (*Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 723 (1947)), the issue decided in *Harvey* was so completely different from the instant controversy as to make that decision absolutely irrelevant to these proceedings.

** *Mid-Continent Pipe Line Co.* v. *Hargrave* and *Durkin* v. *Waldron* were cited by the Fourth Circuit in its argument that the apartment project owners and Petitioner may be treated as joint employers in determining worker coverage under the Act. 439 F.2d at 345.

trine prevents an employer's sidestepping the Act's overtime provisions through the guise of a second job. Thus, in the office building and apartment building industries, courts have held that maintenance workers who are covered by the Act can sue both the building owner as their actual employer and the managing agent as the derivative-statutory employer to recover relief due them under the Act. *Asselta* v. *149 Madison Avenue Corporation*, 65 F.Supp. 385 (S.D.N.Y. 1945), *aff'd*, 156 F.2d 139 (2d Cir. 1946), *aff'd*, 331 U.S. 199 (1947); *Greenberg* v. *Arsenal Building Corporation*, 50 F.Supp. 700 (S.D.N.Y. 1943), *aff'd*, 144 F.2d 292 (2d Cir. 1944), *rev'd in part on other grounds sub nom. Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945).

The Fourth Circuit, in deciding the threshold issue of whether the FLSA applies to a particular business, made the mistake of relying on statutory provisions and judicial precedents which facilitate the FLSA's enforcement but which are irrelevant to the question of the Act's application. Thus, the Fourth Circuit, in determining the Act's application to these workers, decided whether to measure Petitioner's business for coverage, on the basis of whether Petitioner came within the Act's broad definitions of "employer," "employ," and "employee":

> "We, therefore, have no doubt that defendants act 'directly or indirectly in the interest of an employer in relation to an employee' and that the maintenance workers are 'employees' of, and 'employ[ed]' by, defendants within the statutory definition of the Act." 439 F.2d at 345.

The court found it unnecessary to decide whether the apartment project owner's exempt business or Petitioner's

covered business was at issue because it could call the two "joint employers" and avoid having to choose betwen them:

> "Courts have also found that workers could have joint employers for purposes of the Act. See Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655 (10th Cir. 1942); Durkin v. Waldron, 130 F. Supp. 501 (W.D. La. 1955).
>
> "The Second Circuit has held that rental agents may be employers, jointly with the building owners." *Id.* (Footnote omitted.)

The Sixth Circuit's decision that the building owner's business was measured to determine maintenance worker coverage,* which the court below had followed in finding the workers employees of the apartment project owners,** was distinguished on the ground that the joint-employer doctrine affords the alternative of measuring either the owner's or the agent's business. 439 F.2d at 345 n.10.

The decisions in *Greenberg* v. *Arsenal Building Corporation* and *Asselta* v. *149 Madison Avenue Corporation* were relied on by the court to support its conclusion — decisions which not only do not stand for the proposition asserted, but rather support the contrary proposition that the *actual* employer of the maintenance workers is the individual apartment project owner and not the managing agent. See pp. 18-21, *supra*.

Furthermore, the conclusion reached by the Fourth Circuit — that a flimsy and tenuous employment relationship

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* *Wirtz* v. *Columbian Mutual Life Insurance Company*, 380 F.2d 903 (1967), *aff'g* 246 F.Supp. 198 (W.D. Tenn. 1965).

** 312 F.Supp. at 613.

between a worker and his employer's agent is sufficient foundation for enterprise coverage — is contrary to "the history, terms and purposes of the legislation." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944). The Act classifies each of this nation's businesses as either covered or exempt — distinctly implying the absence of the intermediate category suggested by Respondent: "exempt unless you do business with a covered enterprise which acts as your agent *vis-a-vis* your employees."* *See* Sections 3(d), 3(r), 3(s), 6 and 7; S. Rep. No. 145, 87th Cong., 1st Sess., 2-5, 24-34, 40-45 (1961); H.R. Rep. No. 75, 87th Cong., 1st Sess., 7-15, 34-37 (1961).** The Act and the legislative history deal generally with the problem of determining, for coverage purposes, which of two independent business concerns having a close business relationship, is the actual employer in a given case — directing how to decide that it is one or the other, but never that the problem be solved by treating both concerns as the employer. Section 3(r) [proviso]; S. Rep. No. 145, 87th

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* If the FLSA were held applicable to these maintenance workers as Petitioner's employees, the effect on the apartment project owners would be virtually identical to that if the owners were to lose their exemptions.

** For example, the 1961 Senate Report states:

"In general, if an enterprise comes within one of the six categories, all of its employees are covered under the bill regardless of their duties. However, there are express exclusions under which specified employees, establishments, and enterprises would be exempt from the act's minimum wage and overtime provisions, and still others would be exempt from the overtime provisions only." *Id.* at 25.

"Ample provision is made in the bill to insure that the original intent of the sponsors of the act to exclude the small local retail merchants such as the corner grocer, neighborhood drugstore, barbershop or beauty parlor is carried out. Not only must the enterprise have $1 million in sales annually but, as noted else-

Cong., 1st Sess., 40-42 (1961). Neither the Act nor the legislative history contains a shred of support for Respondent's novel theory of statutory interpretation.*

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where in the report, there are other tests to insure that the covered enterprises will be substantially engaged in interstate commerce." *Id.* at 27.

"The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings." *Id.* at 41.

"The committee bill extends coverage to additional employees only in enterprises which have employees engaged in commerce or in the production of goods for commerce, and contains provisions designed to assure that the engagement in interstate commerce activities is substantial." *Id.* at 43.

"To insure that the bill's new coverage in the retail field will reach only those enterprises which are substantially engaged in interstate activities, the bill contains a further test. Retail selling and servicing enterprises covered by section 3(s)(1) as proposed in the bill will not only have employees engaged in commerce or in the production of goods for commerce, and gross $1 million or more annually, exclusive of specified taxes, but will also purchase or receive goods for resale that move or have moved across State lines (not counting movements in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more.

"This volume of purchase and receipts of interstate commerce goods, together with the gross annual sales volume of $1 million or more exclusive of specified taxes, should provide more than adequate assurance that the newly covered enterprises will be those plainly engaged to a substantial extent in interstate commerce and should make it abundantly certain that no small local business will be affected." *Id.* at 43-44. (The bill reported by the Senate Labor and Public Welfare Committee contained a coverage requirement, subsequently removed by the conference committee, that an establishment have done a minimum business in goods that move across state lines).

* Congress, in amending the Act to include enterprise coverage, was careful not to exceed its constitutional power to "regulate Commerce . . . among the several States. . . ." U.S. Const. Art. I, §8. *See Maryland* v. *Wirtz*, 269 F.Supp. 826, 835 n. 14 (three judge court) (1967), *aff'd*, 392 U.S. 183 (1968). By exempting businesses that either were not large or that lacked workers en-

In sum, as a result of its misunderstanding the issue and following inapplicable statutory provisions and judicial precedents, the Fourth Circuit never came to grips with the real question before it—whether the business at issue was the individual apartment project owner's exempt concern or the managing agent's FLSA-covered enterprise.*

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gaged in interstate commerce, it sought to assure that only concerns having a substantial effect on interstate commerce would be affected. Section 3(s). *See* S. Rep. No. 145, 87th Cong., 1st Sess., 3-5, 42-45 (1961). Respondent seeks now to subvert this scheme by proposing to expand the Act's coverage through the stratagem of interpreting the FLSA as requiring only a flimsy and tenuous relationship between a worker and his employer's agent as a basis for enterprise coverage. It is plain from a reading of the Act and the legislative history that Congress never anticipated that enterprise coverage be given such broad reach. The coverage criteria that Congress so carefully and deliberately formulated to assure the requisite affect on interstate commerce, were adopted on the assumption that the Act would apply to a worker only if his *actual* employer was covered.

An FLSA construed as Respondent proposes may exceed Congress' power and so be unconstitutional. At a minimum it would contravene Congress' explicit decision as to the appropriate limit of its exercise of the commerce power in the context of this legislation.

* The Third Circuit's approach in *Hodgson* v. *Arnheim and Neely, Inc.*, 444 F.2d 609 (1972), *rev'd on other grounds*, 93 S. Ct. 1138 (1973), was similarly incorrect. The court relied on *Greenberg* v. *Arsenal Building Corporation* as standing for the proposition that the managing agent was the actual employer (444 F.2d at 611), found that individual building owners and the managing agent could both be employers for coverage purposes (444 F.2d at 611-12), and concluded that the managing agent's business was to be measured on the ground that it fit within the FLSA's definition of an "employer":

> "Since the Company [the managing agent] hires these employees and provides the conditions of their employment, it appears that the Company is 'acting directly or indirectly in the interest of an employer in relation to an employee.' The District Court correctly decided that the Company was an 'employer' of the various persons working at the buildings, as such term is defined by the Act." 444 F.2d at 612.

The Third Circuit considered the small business exemption but only as it related to whether the managing agent was an "enterprise" under the Act. 444 F.2d at 612-13.

The court never considered the FLSA's objective to protect small businesses and the necessity of construing the Act consistently with that objective.*

F. *This Court Should Reject Respondent's Novel Theory of Statutory Interpretation as Contrary to the Manifest Intent of Congress.*

Respondent is asking this Court to construe the FLSA so as to extend enterprise coverage on the basis of something less than an employment relationship. While this Court has the authority to adopt Respondent's novel and unprecedented theory and thereby expand the FLSA's reach, such a step would be ill-advised. Congress, in amending the FLSA, has carefully and deliberately mapped out which businesses are to be covered and which exempt. It specifically provided in the Act for the exemption of local businesses and for the exemption of small businesses. Respondent is asking that Congress' exemptions be judicially abrogated through the stratagem of a novel statutory interpretation that is destitute of support and contrary to judicial precedents.

Under the facts of this case, such an extension would contravene and nullify the express Congressional intention to protect small businesses. A holding here that the workers are employees of Petitioner for coverage purposes, would amount to a judicial taking away from the apartment project owners of a protection clearly afforded them by Congress under the Act.

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* The Fourth Circuit did recognize that it was relevant to its determination which party would bear the cost of higher maintenance worker wages. But it incorrectly concluded that part of that cost would be borne by Petitioner. 439 F.2d at 345.

II.

THE FOURTH CIRCUIT'S DECISION HAS THE EFFECT, IN CONTRAVENTION OF CONGRESSIONAL INTENT, OF DRAWING THE OWNERS' SMALL BUSINESSES UNDER FLSA COVERAGE SOLELY BECAUSE THEY HAD BUSINESS DEALINGS WITH A LARGE ENTERPRISE.

The operation of a typical apartment house requires the employment of one or more workers to provide basic services. Common areas and passageways must be kept clean, utilities provided, and the building generally maintained in good repair. In a small building or project, these tasks can be performed by one man working twenty hours a week or less; often it is done by a single superintendent who lives on the premises. A larger building or project may require a dozen or more, working full time, including one who is in charge of the operation.

However many service or maintenance workers a particular building has, they require supervision. A landlord can provide such supervision in either of two ways —by undertaking the job himself or by engaging a building management company or agent to do it for him. The agent typically requires payment of a set fee, as opposed to taking an equity interest in the building, in return for which it agrees to manage the operation of the building on a day-to-day basis subject to the owner's overall direction and approval. The use of an agent is often the more efficient of the two alternatives.

The effect of the Fourth Circuit's decision is to make the application of the FLSA to these maintenance workers turn

on whether the building owner hires a managing agent to supervise them. That an owner who presently has an agent could avoid coverage merely by dismissing the agent and taking over the supervision of these services himself, testifies to the fundamental unsoundness of this decision.

More important, the result reached by the Fourth Circuit contravenes a clear congressional intent that a business exempt from the FLSA should not be drawn under the Act's coverage simply as a result of dealing with a larger enterprise. The Senate Report accompanying the 1961 amendments that added enterprise coverage to the Act, stated the following in regard to various exemptions contained in Section 3(r):

> "The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings.
>
> "The definition of 'enterprise' expressly makes it clear that a local retail or service establishment which is under independent ownership shall not be considered to be so operated and controlled as to be other than a separate enterprise because of a franchise, or group purchasing, or group advertising arrangement with other establishments or because the establishment leases premises from a person who also happens to lease premises to other retail or service establishments. For example, a retail establishment will not become part of an enterprise which operates a shopping center merely because it rents its establishment from the shopping center operator." S. Rep. No. 145, 87th Cong., 1st Sess., 41.

As the Third Circuit stated in *Hodgson* v. *Arnheim and Neely, Inc.*, this passage from the Senate Report makes "manifest" "the legislative intent to exclude for purposes of the Act separate businesses which use common service organizations." * 444 F.2d at 614.

To penalize these apartment project owners for engaging Petitioner's services would not only be manifestly unfair, it would be a perversion of what Congress intended in adding enterprise coverage to the Act.

III.

AFFIRMANCE OF THE DECISION BELOW WOULD HAVE AN ADVERSE IMPACT ON AN ALREADY DEPRESSED INDUSTRY.

When the FLSA was originally enacted in 1938, Congress limited both the businesses and employees covered under its provisions. While subsequent amendments extended coverage, Congress exercised caution to continue the exclusion for certain businesses. One such exclusion was for small businesses, defined in terms of annual gross volume of sales.** This protection is consistent with the special protection and exclusion from governmental regulation long recognized by Congress and governmental agencies. *See, e.g.*, Small Business Act as amended, 15 U.S.C. §§631 *et seq.*

The adoption of Respondent's theory that the managing agent's business is the measuring entity for coverage would destroy the small business exemption for the apartment

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* This Court, in reversing the *Arnheim* decision, did not take issue with this finding. 93 S. Ct. 1138, 1142-43.

** See footnote at p. 15, *supra*.

house industry. The economic burden of increased labor costs is borne directly and solely by the owner—the small businessman—not the managing agent. To group together all of these small independent businessmen who individually would not be covered under the FLSA merely because they use a common service, the managing agent, would circumvent the congressional intent to protect these businesses.

Application of the FLSA to owners of buildings through the median of managing agents will result in the very dislocation Congress sought to prevent. Significant numbers of apartment buildings are either marginally profitable or operate at a loss. As a result, the number of buildings abandoned has been steadily increasing in major cities, creating a critical housing shortage, especially in the poor and lower middle income sections. Kristof, *Economic Facets of New York City's Housing Problems* at 23 (1970).

New York City, like other large cities, is faced with an acute housing shortage. Studies indicate that one of the primary causes of this shortage is the consistent abandonment of buildings because of increased maintenance and operation costs. Coverage of these otherwise excluded businesses would increase costs that are absorbed solely by the small building owner and would, therefore, accelerate abandonments.

In New York City, the ever-increasing cost of maintenance and operation of apartment buildings has resulted in the abandonment of tens of thousands of housing units each year. Rand Institute Report, *Rental Housing in New York City* at 6 (1970); Kristof, *Economic Facets of New York City's Housing Problems* at 19 (1970). At the same time, the city has an average apartment vacancy rate of

only 1.5% — of every 100 apartments, only one and one-half is available to be let at any given moment. New York Times, February 26, 1973, at 1, col. 1. Therefore, any increase in the abandonment rate would further impair an already severely limited market of available apartments, with its greatest effect falling on inner city residents who can least afford it.

Clearly, Congress did not intend that small independent businesses like the apartment buildings in issue here suffer the adverse economic impact of the Act's application, especially in light of the additional severe socio-economic problems such coverage would cause.

CONCLUSION

For the aforestated reasons, the decision of the Fourth Circuit should be reversed and the complaint in all respects dismissed.

Respectfully submitted,

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